

Proceedings

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2 settlement, indicated to me: We're acting on behalf
3 of 475 Ninth.

4 I said: That's absurd. You're in a
5 conflict with 475. First of all, I represent 475
6 Ninth. You cannot do that. Whatever you're doing is
7 wrong. You're acting against the interest of my
8 client by trying to create some secret agreement in
9 bad faith with plaintiff's attorney --

10 THE COURT: Let me just hear from the
11 attorneys who haven't spoken yet.

12 MR. RUTHERFORD: I'm David Rutherford. I
13 represent R & J.

14 I just want to set forth how the settlement
15 worked, so everybody understands it.

16 THE COURT: Yes.

17 MR. RUTHERFORD: There were two
18 settlements. The first settlement was for seven
19 hundred fifty. The second settlement was for eight
20 seventy-five.

21 The first settlement, R & J paid \$750,000
22 to the plaintiff. In return, the plaintiff agreed to
23 dismiss their action against 475.

24 475 didn't pay anything. We didn't pay
25 money on behalf of 475.

26 The plaintiff can dismiss any part of his

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case at any time he wants; and that's what he did.
So when the case proceeded to trial, 475 was out.

We didn't act on behalf of 475; we paid on
behalf of R & J.

The plaintiff agreed to discontinue when
the case went to trial, which was on damages only,
because VJB's answer had been stricken.

THE COURT: And that decision was upheld by
the Appellate Division.

MR. RUTHERFORD: Right.

THE COURT: I just must say, for the
record, two things.

One, I'm sure the Appellate Division, if
this is going up on appeal, is very familiar with its
own decision and what it said about striking the
answer.

When I struck the answer, something,
frankly, I had -- I think this is the first time I've
ever done it.

Beyond that, I would also say to all of
you, I think it would be a good idea for all of you
to read yesterday's Law Journal. There is a decision
in that Law Journal by Judge Baer, and I would
commend all attorneys to read it.

Next.

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2 MR. RUTHERFORD: The plaintiff had
3 voluntarily dismissed 475 Ninth Avenue. When the
4 case went to trial, 475 was not part of the case
5 anymore.

6 At trial, plaintiff entered into a
7 settlement with VJB and Kajima only. That eight
8 seventy-five is only paid on behalf of those two
9 entities.

10 Plaintiff has tried to tender a release for
11 only those entities and not 475.

12 475 was included in the first settlement,
13 even though they paid nothing; even though we didn't
14 act on their behalf, he dismissed them.

15 The reason that this whole settlement is
16 being hung up now is because he's trying -- being
17 Mr. Devereaux is trying to include 475 in the second
18 settlement so he can try and bring it back and get
19 some of that money back from R & J and Spieler.

20 MR. DEVEREAUX: Can I reply, your Honor?

21 THE COURT: No, I don't want to hear
22 anything else.

23 I was here during the settlement. I've
24 written on this case. I believe what was just said
25 is exactly what happened, and I am denying this
26 motion also because I do not believe the moving party

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has standing to bring this motion.

MR. DEVEREAUX: Judge, with all due respect, they cannot voluntarily discontinue an action by themselves; they need my consent. That's part of the reason why I have standing.

I represent 475, the owners, VJB and the Kajima entities.

They have never done it; they can't voluntarily discontinue things and do things secretly among themselves without my consent.

THE COURT: Mr. Devereaux, if you wish, we can go forward with the trial against 475.

MR. DEVEREAUX: No, Judge, there's a settlement with the plaintiff. LIU paid \$750,000 on behalf of 475 Ninth. They don't get to make that determination.

VJB paid \$125,000 of their own money to settle this case. There's a settlement here. That's not being vacated.

THE COURT: The question then becomes, you have a choice.

If you really feel that way, then we can vacate this last settlement against VJB, Kajima and 475 and go forward with the damages trial. That's the choice. Or else the case is settled.

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You don't have another choice.

MR. DEVEREAUX: Respectfully, your Honor, I disagree. We have one motion here before us --

THE COURT: Do you wish to vacate that settlement?

MR. DEVEREAUX: I want that to be done on papers, Judge.

MR. ROSE: Was that a "No"?

THE COURT: Wait a minute.

You do not want to vacate that settlement?

Are you moving to vacate, because the settlement is clear; it was only -- this was not brought up on the day of settlement on November 9th.

MR. DEVEREAUX: Sure it was, page 5 expressly states right there, Judge: By the way, VJB and all entities reserve their rights vis-a-vis other entities. To the extent they want to collect whatever they want to, it has nothing to do with this. This is only vis-a-vis the plaintiff.

THE COURT: I understand that. But it was clear from everything that preceded that; it was stated that the case had been dismissed against 475 and that this settlement was only with VJB and Kajima.

So I am now saying your position is

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different now. You're saying that 475 is still in the case.

Then everybody's intent during the settlement -- everybody was on a different page. If you wish, at this point, to vacate the VJB-Kajima settlement because 475 was not part of it and you believe 475 was still part of the case, I will now vacate that settlement and we will put it down for trial against 475, VJB and Kajima.

Is that what you want to do?

MR. DEVEREAUX: Your Honor, respectfully, you're inappropriate.

I did not make a motion here. The only motion before your Honor is the motion to reargue --

THE COURT: I just want an answer.

Do you wish to do that or not?

MR. DEVEREAUX: Judge, what we're trying to do is make me do a motion now sua sponte without papers and force me to respond to it. That's inappropriate. That should be on done on papers.

I'll repeat it again.

There was a settlement here vis-a-vis the plaintiff. All other rights were expressly reserved against all other entities, which was the absolute right of 475, Kajima and the entities. That's what's

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on the record. That's the settlement.

Judge, I have a motion pending. I told these counsel that I was going to do a motion.

He said: Well, I have a motion; I'm going to do it.

That should be done on papers, your Honor.

THE COURT: At this point, again, I deny the motion. I granted reargument. I've denied the motion for everything that's been said on this record --

MR. REAGAN: Your Honor, I had a request for motions, too, and I would ask your Honor to rule on them.

MR. ROSE: I need --

MR. DEVEREAUX: This is a sua sponte motion?

MR. ROSE: Your Honor, I have a huge problem right now, and the reason why I came in today is because my client is about to lose his house; and I think your Honor needs to be aware of that.

We settled for \$750,000, which money we cannot accept at this time because we had to sign a hold harmless agreement which, if Mr. Devereaux continues, my client will not get that money; he will lose his house.

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2 We went to trial because Mr. Devereaux
3 still wouldn't settle after two mediations that we
4 were asked to go to, where the adjuster didn't show
5 up the first time. We had to cancel it.

6 My client had to fly in from Florida. He
7 had to move his family to Florida because he can no
8 longer work in the construction trade.

9 I have -- that I'd like to mark as a Court
10 Exhibit -- the mediation memo -- which is very
11 important -- that is contained within the Court
12 record; and the reason why -- it tells you why we
13 entered into the settlement agreement.

14 THE COURT: Well, let's mark it as Court
15 Exhibit 1.

16 (So marked.)

17 MR. ROSE: Your Honor struck the
18 defendant's answer on April 28th, 2005.

19 Mind you, the person that hired
20 Mr. Devereaux, Liberty Mutual International, has
21 \$1 million in insurance coverage.

22 On April 26th of -- well, even backing up.

23 MR. DEVEREAUX: Judge --

24 THE COURT: Let him finish.

25 MR. ROSE: On April 26, 2007, a disclaimer
26 letter, which is part of Plaintiff's Exhibit 1, which

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2 has just been marked, a disclaimer letter was issued
3 by Liberty International on April -- which is
4 Mr. Devereaux's carrier -- on April 5th, 2007.

5 There was a disclaimer letter -- excuse me.

6 April 17th of 2007, a disclaimer letter was
7 written by the excess carrier; and that is Exhibit C
8 of Plaintiff's Exhibit 1.

9 The disclaimer letter was issued --

10 MR. DEVEREAUX: Judge, that's inappropriate
11 to submit a document that is confidential -- which he
12 expressly agreed to -- to this Court and mark it as
13 an exhibit. That's inappropriate, unethical conduct
14 right there.

15 MR. ROSE: This is very important, Judge.

16 The disclaimer letter was issued because,
17 on April 5th of 2007, Mr. Devereaux, for the first
18 time -- and you can check the Court records because
19 we were in Court that day -- on April 5th of 2007,
20 Mr. Devereaux for the first time provided excess
21 coverage information, April 5th of 2007.

22 That day -- and there were two different
23 excess carriers.

24 That day, I wrote to both excess carriers
25 and, in response to my letter, I got responses that
26 said: Your letter to us was our first notice.

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2 So my client, had we proceeded to trial
3 against Mr. Devereaux's firm and VJB and taken a
4 verdict, my client, who's on the verge of losing his
5 house right now, would have faced further appeal,
6 further delay; and he was forced to accept this
7 settlement. And this is still going on. Because
8 now, where we finally acquiesced, where we felt he
9 had a settlement that was palatable to him so his
10 family could live, his wife and two kids, so they
11 could live, when we finally had something that he
12 could live with, then what we did is we accepted that
13 rather than taking a verdict on the case. We
14 accepted those terms.

15 And Mr. Devereaux, despite the fact that he
16 says that 475 is paying, it's clear on the record
17 that they're not.

18 We tendered releases to him on
19 November 9th of 2007. We tendered releases. We
20 tendered a stipulation of discontinuance; and we
21 tendered a W-9 with my law firm's Tax I.D. number;
22 everything that I have to do.

23 And what the CPLR clearly states is that
24 after 21 days of tender of the things that I just
25 mentioned, I then have the authority and the ability,
26 without notice, to offer judgment to the Court and

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2 have judgment entered with appropriate costs,
3 interest and sanctions.

4 Now, if we walk out of here today without
5 those things happening, then this is going to
6 continue on and my client is going to lose his house
7 after flying in for trial, because there was not a
8 fair settlement agreement reached.

9 THE COURT: Let me just say the November
10 settlement that we're talking about, the November --
11 I'm sorry. The November 9th, 2007 settlement was at
12 trial. The trial would have been long over by now
13 had we not settled this case.

14 MR. DEVEREAUX: We're here on one motion --
15 excuse me --

16 THE COURT: Let me stop this right now.
17 Do you have a judgment?

18 MR. ROSE: Yes, I do, your Honor.

19 THE COURT: I will sign that judgment.

20 MR. DEVEREAUX: Judge, I object to it.
21 May I have an argument why?

22 THE COURT: Yes.

23 MR. DEVEREAUX: It was never tendered
24 pursuant to the statutory requirements of CPLR
25 5003-a. (g) which requires releases and such papers
26 to be sent or personally delivered or be mailed by

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2 registered or certified mail. They never complied
3 with that statutory requirement.

4 I immediately notified them they had not
5 complied with Section 5003-a, so this Court has no
6 jurisdiction or lacks the authority to execute or
7 sign a judgment because they never complied with the
8 statute. I also told them that there were several
9 other defects with respect to their papers, and I
10 rejected them.

11 I also proffered my releases to them.

12 This should all be done on motion papers,
13 your Honor.

14 It should not be done sua sponte in
15 connection with the motion to reargue. This is,
16 procedurally, improper before your Honor.

17 What they're trying to do is preempt and,
18 with frenetic passion, get your Honor to sign off on
19 it because they're all attacking me, which is
20 inappropriate.

21 THE COURT: Let me say, for the record, I
22 am going to sign the judgment, if the judgment is
23 given to me today.

24 I am shocked at what has gone on in this
25 case. I do think that this may be a case for the
26 Character Committee.

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MR. REAGAN: I was going to remind your Honor --

THE COURT: I do want to say also something that may or may not be part of the record.

Although Mr. Devereaux was in Court on November 9th, his partner -- and I believe it was Paul Weidenbaum -- conducted all of the proceedings, and Mr. Devereaux sat in back in the audience.

MR. DEVEREAUX: Judge, I wasn't --

THE COURT: And there was none of this mentioned. I believe that this case, the way this case has been conducted has really pushed the envelope of ethics.

And, I think, given what this plaintiff has gone through and given -- this is a 2003 case, I must say -- I am more than happy to sign the judgment in this case to avert an injustice.

MR. DEVEREAUX: Judge, the release itself has a stipulation of discontinuance in it which flatly contradicts the terms and conditions of the open court settlement --

THE COURT: What was that?

MR. DEVEREAUX: Which on page 5 and 6. It said that VJB, 475 Ninth and all entities expressly reserve their rights against all other entities.

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On small font paper -- which I request be marked, Judge, as an exhibit -- the smallest possible font, all the way on the bottom, in the middle, an add-on sentence said -- it's a stipulation of discontinuance incorporated in a general release, which is unheard of.

"It is agreed between releasors and releasees that all claims, crossclaims, counterclaims, third-party actions and declaratory judgment" -- declaratory judgements, which are severed and separate from this action -- "actions arising out of the subject accident of 4/2/03 are to be dismissed with prejudice."

That flatly contradicts the terms and conditions of this open court settlement, Judge, and it cannot be the basis of a judgment; it's inappropriate.

That's where I'm saying they have not complied with the statutory requirements of 5003-a in good faith, not complied with applicable case law and custom and practice.

THE COURT: Okay, yes.

MR. RUTHERFORD: If you look at page 2 of the transcript, your Honor, line 17, that sets out the settlement of the second action.

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You may want to read that into the record.

It's very clear --

THE COURT: Well, I'll read it. This is from the November 9th, 2007 transcript. It's by Mr. Carfora; and it says, quote:

"It is hereby agreed, stipulated by and between the parties that the case of George Santoli and Stacey Santoli against VJB Construction Corporation/Kajima Development Corporation, a joint venture, and VJB Construction Corporation, individually, is settled in the amount of \$875,000.

"That amount of eight seventy-five will be paid as follows:

"The insurance company for the aforementioned entities" --

And then there's an interruption; and it goes over to page 3, line 6.

"Liberty Mutual International will pay 750,000 and VJB Construction Corporation will pay 125,000 for a total of \$875,000."

MR. DEVEREAUX: Exactly, your Honor.

That's exactly --

THE COURT: On line 10, by the Court, it says: "Okay. And there was a prior settlement, am I correct, with other defendants, and that was for

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\$750,000?"

And Mr. Carfora responds: "Yes."

The Court says:

"And those defendants were" --

And then Mr. Devereaux pipes up from the audience: "R & J and, I believe, 475, all the entities we expect to get a release from -- the plaintiff releasing all entities.

"MR. CARFORA:" --

MR. DEVEREAUX: That's me. The reporter --

THE COURT: Mr. Devereaux's saying: "I can't settle without getting a release from all" -- It states "Mr. Carfora."

Mr. Devereaux said: "I can't settle without getting a release from all entities."

MR. RUTHERFORD: Your Honor, I think the portion you just read made clear the 875 was the VJB entities.

THE COURT: Yes.

MR. RUTHERFORD: You want a release; there's two separate releases.

THE COURT: There's two separate settlements.

MR. RUTHERFORD: Right. And the first settlement is 475 and R & J; and the second is VJB.

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2 That's clear from the record. And your Honor knows
3 it. Everybody --

4 MR. DEVEREAUX: That's not true. That's
5 absolutely -- that's insane for him to represent that
6 he's representing 475 Ninth. They cannot voluntarily
7 discontinue against clients I represent.

8 THE COURT: I understand. This is over.
9 We've been arguing for quite some time.

10 MR. DEVEREAUX: Judge, I'd like the release
11 marked as an exhibit.

12 THE COURT: Absolutely. Court Exhibit 2.

13 MR. ROSE: I'd like a clean copy. I don't
14 understand why it's yellow-lined.

15 Mr. Devereaux, I have it.

16 What I'm offering to the Court, as
17 Plaintiff's-Court Exhibit Number 2, is the cover
18 letter from my office to Mr. Rutherford's office, as
19 well as to Mr. Devereaux's office, which tenders the
20 general release, the stip of discontinuance, as well
21 as my firm's W-9.

22 Also contained is an affidavit of service
23 of mailing, just so there's no mistake.

24 So everything shows a proper offer pursuant
25 to the CPLR of the appropriate documents.

26 THE COURT: Okay. I'm marking what

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Mr. Devereaux wanted, but a clean copy, as 2 and what you want as Court Exhibit 3.

MR. DEVEREAUX: Judge, first of all, I still have to preserve my objection with respect to the first exhibit, which was inappropriately submitted. It's a mediation document.

THE COURT: You already have preserved it.

MR. DEVEREAUX: I would also like to have my letter proffering the releases I wanted executed.

MR. REAGAN: Before you finish, I would like for you to remember that I have two requests at the end.

Your Honor, that's all I'm saying; before we end, I have asked for affirmative relief as well, and I would just like to be heard on that.

THE COURT: Which affirmative relief?

I need a clean copy.

MR. ROSE: You'll agree I can submit the release I mailed to you?

MR. DEVEREAUX: Mailed not by virtue of the statute--

MR. ROSE: That's it, your Honor.

THE COURT: It will be part of 3. We'll mark it as Court Exhibit 2.

MR. ROSE: Okay. Now, as Court Exhibit --

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MR. DEVEREAUX: I would like to mark this
as 4 --

THE COURT: Everybody is interrupting
everybody else, and I think we've made enough of a
record at this point.

Give me the judgment. I will sign the
judgment.

MR. DEVEREAUX: Judge, I would like my
releases that I submitted to the Court marked as
well. If he's going to be submitting his releases, I
want my releases.

THE COURT: What release?

MR. DEVEREAUX: I submitted releases to the
plaintiff to effectuate the settlement vis-a-vis the
plaintiff.

I would like, since he's submitting his
releases, which I say do not comply with the terms
and conditions of the settlement, which was reached
in open court and, which I think is totally
inappropriate and without authority, I would like to
submit my releases that I submitted to him to have
executed.

THE COURT: We'll mark that Court
Exhibit 4.

Now, may I have the judgment; and I will

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sign it.

MR. ROSE: Yes, your Honor.

As I'm giving -- there's just one point that I need to make with the judgment.

THE COURT: And what is that?

MR. ROSE: The point is, as your Honor knows, with a judgment, it is important that a liability date be affixed; and also, on behalf of my client, I feel that there has to be teeth to this judgment; otherwise we're going to be talking about years of further litigation.

Now, your Honor struck the defendant's answer on April 28th of 2005. I would ask that the Court affix the interest date on the judgment at that date because the defendant's conduct is what's caused this delay for the last two-and-a-half years; therefore prejudicing my client. And if they continue with this frivolous conduct, we can go on indefinitely.

So the appropriate way to handle this judgment would be to award interest, based on the striking of the defendant's answer as of April 28th of 2005, and interest on the total amount of the settlement, because we cannot take the money from the other party.

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THE COURT: Wait a minute. I don't understand your request.

The interest would be against who from the date I struck the answer?

MR. ROSE: The interest against VJB Construction Corp., the entity that is holding up my client from recovering. And the interest that should be awarded should be based on the entire settlement amount, because my client has not seen the benefit of any of that money.

So the interest should be calculated based on the number, \$1,625,000.

THE COURT: Well, I'm willing --

MR. ROSE: And that's the only way we have any chance of justice here.

THE COURT: Well, this is what I'm willing to do. I am willing to use the date you suggest as against VJB only, and only use that settlement amount.

However, in terms of the entire settlement amount, what I will do is I will, in terms of sanctions, because I believe this is --

MR. ROSE: And I misspoke before. The total judgment is \$875,000.

MR. DEVEREAUX: Judge, I think this is

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highly inappropriate.

THE COURT: I understand.

And in terms of sanctions, I am willing to sanction for frivolous conduct; and I believe there has been tremendous amounts of frivolous conduct here which have prejudiced and impacted on the plaintiff; I am willing to sanction VJB, from today's date onward, interest on the entire settlement.

MR. ROSE: Thank you.

MR. REAGAN: Your Honor, he's spoken for 15 minutes --

MR. DEVEREAUX: This is inappropriate, Judge.

THE COURT: At this point, I'm closing the record.

(Discussion off the record).

THE COURT: On the record.

MR. REAGAN: First of all, I would just request about three minutes without interruption.

THE COURT: You can have one minute.

MR. REAGAN: One minute. I understand your Honor's frustration. Believe me; on this side of the aisle, we all do.

However, when your Honor said you had never stricken an answer before, apparently that wasn't

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2 enough of a lesson.

3 All of this is unnecessary. If counsel had
4 separate counsel for 475 and VJB, as there should
5 have been, none of this conflict would have arisen
6 and none of this would have happened. It all stems
7 from the fact that counsel represented two clients
8 who have materially adverse positions.

9 THE COURT: I think you've said this
10 already.

11 MR. REAGAN: I would request that based
12 upon the frivolous conduct and the material false
13 allegations that counsel's put on the record, that
14 are demonstrably false, I would request that
15 sanctions be imposed to the defendants as well so
16 that we can be recompensed for all of this
17 unnecessary time and money that we have had to expend
18 coming here time and time and time again.

19 THE COURT: At this point, I made my
20 rulings and the record is the record.

21 MR. ROSE: The entire case needs to be
22 discontinued.

23 THE COURT: This case is discontinued. It
24 has been settled.

25 MR. ROSE: The entire case, including
26 third-party actions --

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THE COURT: Please, everybody, you have my rulings. I believe as a result of my denial of the motion that was before me today, the case is over.

Take your appeals, if you need to appeal.

(Record closed.)

* * *

Certified to be a true and accurate transcript of my stenographic notes

Mark L. Bowin

MARK L. BOWIN
Official Court Reporter

so ordered
[Signature]
12/13/07

FILED
DEC 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

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STATE OF NEW YORK }
 } ss.
COUNTY OF NEW YORK }

Filomena Pesce, duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age, and resides in Brooklyn, New York.

On 12/13/, 2007, deponent served the within NOTICE OF ENTRY on:

Devereaux & Weidenbaum, LLP
Michael J. Devereaux
39 Broadway, Suite 910
New York, New York 10006

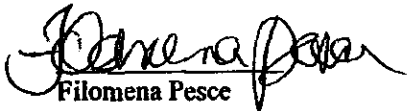
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Said address(es) designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a post paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


Filomena Pesce

Sworn to before me this

13th day of December, 2007.


Notary Public

Stanley Soares
Notary Public, State of New York
No. 01506144667
Qualified in Bronx County
Commission Expires April 24, 2010

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GEORGE SANTOLI,

Plaintiff(s),

-against-

VJB CONSTRUCTION CORP.,

Defendant(s).

HACH & ROSE, LLP
Attorneys for Plaintiff(s)
GEORGE SANTOLI and STACEY SANTOLI

185 Madison Ave, 8th Floor
New York, NY 10038
Tel. (212) 779-0057
Fax. (212) 779-0028

To:
Attorneys for:

Service of a copy of the within **NOTICE OF ENTRY**
is hereby admitted.
Dated:

Attorneys for:

PLEASE TAKE NOTICE

- ☐ That the within is a (certified) true copy of a
Entered in the office of the Clerk of the within named court on _____ 20____
- ☐ That an Order of which the within is a true copy will be presented for settlement to the Hon.
one of the judges of the within named Court,

at
on _____ 20____ at _____ M.

Dated:

HACH & ROSE, LLP
Attorneys for Plaintiff(s)
GEORGE SANTOLI and STACEY SANTOLI

185 Madison Avenue, 8th Floor
New York, New York 10016

To:
Attorney(s) for: